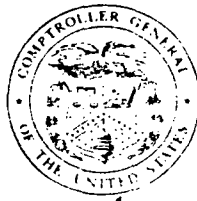


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

40935

FILE: B-173766

DATE: July 15, 1974

95255

MATTER OF: Ventilation Cleaning Engineers, Inc.

DIGEST: Where primary issue before ASBCA was number of hours contractor's employees worked on project and contract contained clause providing for disputes arising out of contract labor standards provisions being resolved under contract, GAO will follow ASBCA decision notwithstanding contrary Department of Labor opinion, since issue involved matter of enforcement of labor standards reserved for established contract settlement procedures of contracting agencies.

In letter of April 30, 1974, the Acting Administrator, Wage and Hour Division, Department of Labor, contended that Armed Services Board of Contract Appeals (ASBCA) decisions No. 16704 of August 3, 1973, and March 19, 1974, finding that Ventilation Cleaning Engineers, Inc., was entitled to a refund of \$5,702.27 withheld under Air Force contract F65501-1-70-C-0137 for alleged labor standards violations should not be followed by our Office in the disbursement of the withholdings because the contracting officer with the concurrence of the Department of Labor found otherwise and the ASBCA was in error in assuming jurisdiction of the matter.

It is contended that the ASBCA was in error in assuming jurisdiction pursuant to ASPR 18-706, since the matter was for determination by the Secretary of Labor or his authorized representative in accordance with the Secretary's authority and responsibilities under the Davis-Bacon Act, 40 U.S.C. 276a, the Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, the Copeland Act, 40 U.S.C. 276c, Reorganization Plan 14 of 1950, 5 U.S.C. appendix, and the Department of Labor regulations promulgated to implement their provisions, 29 CFR part 5.

The Department of Labor's regulatory functions are based on its authority under Reorganization Plan No. 14 of 1950 to prescribe appropriate standards, regulations, and procedures for the purpose of coordinating the administration of labor standards. Limitations

accompanying such authority with respect to the performance of enforcement duties are plainly established in the Presidential message adopting the Plan which states, in pertinent part, as follows:

"The actual performance of enforcement activities, normally including the investigation of complaints of violations, will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance."

Also, in this connection, Senate Report No. 1546 issued by the Committee on Expenditures in the Executive Departments in commenting on Reorganization Plan No. 14 of 1950 states on page 3 "that the enforcement and administration of labor standards are not transferred by the plan but remain vested in the individual agencies and the departments of the Government." Our Office, in commenting on the Plan, has stated that authority to prescribe uniform and consistent standards for observance by contracting agencies in the policing of contractor's obligations does not include power to make individual enforcement determinations involving the settlement of contract conditions through which wage standards of the Davis-Bacon Act are made effective. Neither the Davis-Bacon Act nor the Plan evidences any legislative intent to modify or restrict the established contract settlement procedures of Federal agencies or to so empower the Secretary of Labor. 43 Comp. Gen. 84, 86 (1963). Moreover, it has been our position for many years that the authority placed in our Office by the Davis-Bacon Act to determine violators, impose debarment, and make wage adjustments, was not disturbed by the Plan. 43 Comp. Gen., supra, and 40 id. 565, 570 (1961). Thus, in the present case, at least in regard to the Davis-Bacon Act violations allegedly arising from the contractor's employees working more hours than they were paid for, our Office is not required to comply with the request of the Acting Administrator, Wage and Hour Division, "that the GAO should disburse the withheld funds to the affected employees, rather than to the contractor." Consequently, our Office may, in appropriate cases, follow the findings of the Board in regard to Davis-Bacon violations. In fact, we have done so previous to this case. Of course, the Department of Labor does have authority to make authoritative rulings in connection with wage determinations and wage rates. 40 Comp. Gen., supra and B-147602, January 23, 1963. See United States v. Binghamton Construction Co., Inc., 347 U.S. 171 (1953) and Nello L.

Teer Co. v. United States, 348 F. 2d 533 (1965). Also, see 40 U.S.C. 276a(a) concerning the Secretary of Labor's authority to determine minimum prevailing wages.

Apparently, the Department of Labor concurs with the ASBCA determination that there was a Copeland Act violation chargeable to the contractor. Therefore, whether the ASBCA usurped the Department of Labor's jurisdiction in that regard is academic. With respect to the Contract Work Hours and Safety Standards Act underpayments since the Department of Labor's authority under Reorganization Plan No. 14 does not extend to actual administration and enforcement, the Department's authority in this area also is limited. In that regard, ASPR 18-706, in pertinent part, states:

"* * * Disputes arising out of the labor standards provisions of a contract which cannot be settled administratively at the project level shall be subject to the Disputes clause, except for disputes involving the meaning of classification, wage rates contained in the wage determination decisions of the Secretary of Labor, or the applicability of contract labor provisions. Pursuant to the clause in 7-603.26, these shall be referred to the Secretary of Labor for an opinion, in accordance with the procedures of the Secretary of Labor * * *"

The clause in ASPR 7-603.26, entitled "Disputes Concerning Labor Standards (1965 JAN)," included in the Air Force contract involved in the present case, states:


"Disputes arising out of the labor standards provisions of this contract shall be subject to the Disputes clause except to the extent such disputes involve the meaning of classifications or wage rates contained in the wage determination decision of the Secretary of Labor or the applicability of the labor provisions of the contract which questions shall be referred to the Secretary of Labor in accordance with the procedures of the Department of Labor."

ASPR 18-706 and the above contract clause carefully delineate the Secretary of Labor's jurisdiction. Clearly it does not include administration and enforcement functions. In that connection, the

Boards of Contract Appeals have recognized that there are areas in which the Department of Labor has jurisdiction and have dismissed for lack of jurisdiction cases involving job classifications or rates to be paid employees. Southwest Engineering Co., Inc., ASBCA No. 12091, 68-2 BCA 7176; Appeal of Gersten Construction Co., ASBCA No. 5937, 60-1 BCA 2602; and Appeal of The Norman Company, Inc., ASBCA No. 1643, 65-2 BCA 5250. On the other hand, where there were factual disputes not involving the Department of Labor's jurisdiction, the ASBCA has rendered decisions on the labor violations controversies. Anaco Reproductions, ASBCA No. 13779, 70-1 BCA 8236; Albert C. Rodinelli, ASBCA No. 10405, 67-1 BCA 6360; Barry Industries, ASBCA No. 10289, 66-1 BCA 5357; Alliance Properties, Inc., ASBCA No. 9665, 65-1 BCA 4648, Florida Builders, Inc., ASBCA No. 9014, 1963 BCA 3892.

The primary issue to be resolved in the immediate case was the number of hours the employees in question worked, which is a factual matter not reserved for the Department of Labor. The fact that the Department by its letter of July 7, 1971, concurred in the contracting officer's findings should not deprive the contractor of its rights under the Disputes clause.

For the above reasons, our Transportation and Claims Division has been instructed today to disburse the contract withholdings in accordance with the findings of the ASBCA. See S & E Contractors, Inc., v. United States, 406 U.S. 1 (1972).


Deputy Comptroller General
of the United States